IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 5342

JAMES WINTFORED REWIS and
MARY LEE WILLIAMS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Miscellaneous:

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OPINION BELOW

The opinion of the Court of Appeals (Appendix) is reported at 418 F.2d 1218.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on December 5, 1969. A timely petition for

rehearing was denied on April 7, 1970. By order of Justice Black the time for filing a Petition for Writ of Certiorari was extended to June 5, 1970. The petition was transmitted on Thursday, June 4, 1970, and was received and filed June 8, 1970. It was granted October 12, 1970. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

WHETHER INTERSTATE CHARACTER IS BESTOWED UPON AN INTRASTATE NUMBERS GAME BECAUSE PLAYERS, NOT OTHERWISE INVOLVED IN THE GAME, CROSS STATE LINES TO PLAY?

STATUTE INVOLVED

Section 1952 of Title 18, United States Code (sometimes called the Travel Act, or Anti-racketeering Act):

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to–
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000.00 or imprisoned for not more than five years, or both.
>
> (b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of

the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury. Added Sept. 13, 1961, Pub. L. 87-228, § 1(a), 75 Stat. 498, amended July 7, 1965, Pub. L. 89-68, 79 Stat. 212.

STATEMENT OF THE CASE

James Rewis and Mary Williams were found guilty of traveling and causing travel in interstate commerce with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on, of an unlawful gambling activity (lottery) in Florida.[1]

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[1] 18 U.S.C. § 1952: Interstate and foreign travel or transportation in aid of racketeering enterprises.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2) and (3) shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the States in which committed or of the United States.

They were convicted of that offense in each of eight substantive counts of the indictment charging the offense on various Saturdays between May 8, 1965, and August 14, 1965. Rewis and Williams were also found guilty of conspiracy (to commit the substantive offenses).[2] Rewis was sentenced to serve a term of five years imprisonment (five years on each count to run concurrently); Mary Williams was sentenced to serve three years imprisonment (three years on each count to run concurrently).

Mary Williams maintained a residence in a cluster of small small homes in a small rural community at Yulee, Florida, approximately fifteen miles south of the Georgia State line. During the period of time covered by the indictment, she sold lottery tickets from her home to various persons who would come there to purchase them. Among the numbers purchasers, or bettors, were some persons who lived just across the Georgia border and would drive automobiles to the Mary Williams home for the purpose of placing bets with her. The bets were relatively small.[3] The lottery was

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(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

[2]The indictment contained eighteen counts: the one conspiracy count, two gambling stamp counts (26 U.S.C. § 7203) [Rewis' conviction of the gambling stamp counts was reversed on authority of *Grosso v. United States*, 390 U.S. 62, and *Marchetti v. United States*, 390 U.S. 39], and fifteen substantive counts (18 U.S.C. § 1952). In addition to Rewis and Williams, eight other persons were charged as co-defendants in the indictment. Of these, motions for judgment of acquittal were granted as to four; the jury returned a verdict of not guilty as to two; and, the Court of Appeals for the Fifth Circuit reversed as to two.

[3]The largest bet on any one number was $5.00 (Tr. 670) and for the two hours on Saturday morning when most of the business was conducted, a total of $75.00 was taken in (Tr. 636). The week's receipts from the Williams house on the day the arrests were made was $153.00 (Tr. 1477); at the time of the arrest Rewis had $1,541.00 in his pocket (Tr. 2044).

one known as "Cuba" in which the winning number was drawn weekly on a Saturday afternoon. Rewis went to Mary Williams' home during late morning each Saturday; he would pick up the lottery tickets for the previous week's business and depart (Tr. 638, 666 thru 668).

The six acquitted defendants were Georgia residents whose automobiles had traveled across the State line on various Saturdays and were traced to the Mary Williams home. Neither Rewis, nor Mary Williams, both Florida residents, had crossed any State lines, nor was there any other evidence of interstate character than the travel by the acquitted defendants.

At the trial, Rewis and Williams contended that there was no evidence of an interstate nature to justify a conviction under § 1952. They acknowledged that there was evidence of bettors' travel across the State line to place wagers at the Mary Williams home, but maintained that bettors could not be convicted under the Florida gambling statute and if they could not be convicted the government's case must fail. The trial judge disagreed and, in fact, instructed the jury, "You are instructed that the statute just read may be violated by 'buyers' or 'players' (Tr. 2562). The trial judge refused to permit counsel to argue to the jury that the bettors' travel did not bring Rewis and Williams within the proscriptions of the federal statute (Tr. 2269 thru 2277).

The Fifth Circuit agreed with the defense contention that § 1952 does not apply to the bettors of a gambling operation and reversed as to two convicted defendants upon the theory that the only evidence against them was that they were bettors. The Court affirmed as to Rewis and Williams, however, upon the theory that Rewis and Williams had attracted the out-of-state bettors to the Florida lottery and that by doing so they had themselves come within the proscriptions of § 1952 because they "agreed to operate a lottery which would be 'facilitated' by being patronized by persons coming to it from outside of

the State of Florida." (Appendix–Opinion of Court of Appeals for the Fifth Circuit.)

SUMMARY OF ARGUMENT

The Travel Act condemns travel in interstate or foreign commerce with intent to commit certain specified unlawful activities among which is gambling. The petitioners, James Wintfored Rewis and Mary Lee Williams, conducted a small gambling operation (lottery) in a rural community approximately fifteen miles south of the Georgia State line. The only evidence of travel in interstate commerce was the movements of a relatively small portion of customers of the gambling operation who traveled from Georgia to Florida to place bets at the Williams home.

The opinion of the Fifth Circuit acknowledged that the bettors could not be guilty under the statute, but affirmed the convictions of Rewis and Williams upon the theory that, by placing their gambling operation in Florida fifteen miles away from the Georgia border they had "attracted" Georgia players and thus the interstate travel element of the offense was supplied.

This novel construction of the statute greatly broadens and extends the federal criminal jurisdiction to the point that a person committing any of the specified unlawful activities will be brought within the federal jurisdiction if a "customer" of a gambling, liquor, narcotics, or prostitution enterprise travels in interstate commerce. Neither the statutory verbiage nor the intent of the Congress justifies such interpretation.

ARGUMENT

THE FIFTH CIRCUIT'S CONSTRUCTION OF 18 U.S.C. SECTION 1952 (TRAVEL ACT) DRASTICALLY BROADENS AND EXTENDS FEDERAL JURISDICTION BEYOND THAT REQUIRED BY THE STATUTORY VERBIAGE OR THE INTENT OF THE CONGRESS.

The statute, insofar as here pertinent, prohibits travel in interstate commerce with intent to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of any business enterprise involving gambling, certain liquor, narcotics or prostitution offenses in violation of State laws. This statute was enacted in 1961 at the request of the Attorney General to combat "organized crime and racketeering" (Senate Report No. 644, 87th Cong. 1st Sess., 1961). One of the essential elements of the crime created by the statute is travel in interstate commerce.

The only trial evidence of interstate travel consisted of that of nine persons (eight defendants and a non-defendant witness). The trial judge found that there was insufficient evidence that four of these persons traveled in connection with the gambling activity and accordingly granted motions for judgment of acquittal (Tr. 2015). There was evidence that the other four defendants and the non-defendant witness traveled from Georgia to Florida for the purpose of buying lottery tickets for themselves; however, the jury acquitted two of them (Tr. 2621, 2622). The remaining two were convicted upon instructions from the trial judge that players or bettors could be guilty under the statute; but, the Court of Appeals for the Fifth Circuit construed Section 1952 not to proscribe the activities of the lottery bettors and reversed as to them—leaving only Rewis and Williams under judgments of guilt.

In order to affirm the convictions of James Rewis and Mary Williams, the Court below had to find, and did find, that the operation of the Florida lottery, fifteen miles from

the Georgia State line "attracted" the players from Georgia to Florida and although the players themselves could not be guilty of violating the statute, their travel supplied the necessary evidence to sustain the guilty verdict.

The statute does not specifically condemn the action of one who attracts a gambler, prostitute's customer, narcotics user, or liquor buyer, to travel in interstate commerce. It is therefore necessary to inspect the statute to determine if such interpretation might be inferred from its language and if it may and the language is vague, was it the intent of Congress that the statute should be so construed? In this regard legislative history is relevant. *United States v. American Trucking Assoc.*, 310 U.S. 534, 542-544; *United States v. Dickerson*, 310 U.S. 554, 562; *Commissioner v. Estate of Bosch*, 387 U.S. 456, 463.

The words of the statute neither require nor permit the "attraction" theory. The statute proscribes certain activities by someone who "travels in interstate or foreign commerce."[4] It appears that the interstate commerce feature was inserted to bring the statute within the authority of the Congress to regulate commerce between the states; thus the interstate travel is an essential element of the offense.

The interpretation that the bettors or players do not violate the statute is amply supported by the legislative history of the act, infra.

If the Congress had intended the statute to be violated by one who causes another to travel in interstate commerce for the purpose of participating in the "unlawful activity" it would have said so. Even then there would be some

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[4]The statute goes on "* * * or uses any facility in interstate or foreign commerce * * *." The indictment, in the substantive counts, charged "travel" only; and the use of interstate facilities was stricken from the conspiracy count. Thus, this portion of the statute is not involved here.

question as to the sufficiency of such causation by the mere existence of the unlawful activity in a location where interstate travelers might find it available.

The bettors in this case were ordinary arms-length customers. So far as can be told from the evidence they decided for themselves if, when, whether, where, how, how often, and how much they would bet. Neither Rewis nor Williams had any power of command or supervision over them. They did not represent Rewis or Williams or act on behalf of them in any way. Nor were they in the employ of either Rewis or Williams, or performing any service for them. Yet, the effect of the Fifth Circuit opinion is that Rewis and Williams are criminally responsible for the travel of their customers.

The Fifth Circuit opinion concludes that Rewis and Williams "caused" the interstate travel of those who placed bets with them. The statute does not contain the word "cause." The statute simply says whoever "travels." An individual can become criminally liable under § 1952 for causing travel only by the operation of 18 U.S.C. § 2:

> "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> "(b) Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Section 2(b) is the general criminal statute which is plainly directed at the classic agent-principal situation and was obviously passed for the purpose of making the moving parties in a federal crime fully responsible for the crime even though they have arranged for the direct or physical commission of the offense to be done by someone else. The statute was never intended to have such broad, far-reaching meaning as to be the crutch to uphold the Fifth Circuit opinion in this case which carries the concept of causation to its furthest logical limits—further than would

be permitted in a civil case under the tort theory of proximate cause. Rather, as pointed out in *Pereira v. United States*, 202 F.2d 830, 837 (5th Cir. 1953), "* * * Section 2(b) does not enlarge criminal liability, but is merely a restatement of existing law." This statute only applies when the agent himself commits a crime caused by his principals. If the act of the agent would not constitute a crime, even if it had been committed by the principal, then no crime exists. Section 18 U.S.C. 2(b) does not create a crime when one does not exist. Here, the bettors who crossed the State line did not commit an offense, therefore, one who would "cause" them to cross a State line would not have committed an offense.

The "attraction" theory upon which the Fifth Circuit opinion is based has vast implication, the effect of which is to confer federal jurisdiction in a multitude of circumstances where such federal jurisdiction was not heretofore considered to be vested. Any situation involving gambling, liquor, narcotics, prostitution, extortion, bribery or arson, where the perpetrator of the State crime has some reason to believe that a customer or victim has crossed a State line would thus come within federal jurisdiction. Almost every principal tourist resort would be subjected to as much federal policing as it would state policing; the tourist hotel bridge player who engages out-of-state guests in a bridge game for money; the backroom poker player where out-of-state guests participate in the game; the hotel prostitute who should know that her customer is from another State; the bar girl where unlawful liquor is being sold. Nor does a tourist resort have to be involved. The unlawful activity need only be near a highway traveled by interstate travelers or located in an area where out-of-state people are likely to visit. Basic law enforcement by federal officers would be extended to places where interstate travel is part of the regular movement of the populace, such as New York City, Chicago, Philadelphia, Los Angeles, New Orleans, San Francisco. A myriad of other circumstances, limited only by man's imagination, would thus come within federal jurisdic-

tion. It is not necessary that the travel be with the intent to commit the crime, it is only necessary that the unlawful activity be incidental to the interstate travel, *United States v. Carpenter*, 392 F.2d 205 (6th Cir. 1968), nor is it necessary under the Fifth Circuit opinion that the defendant have actual knowledge that the customer or player traveled in interstate commerce, it is only necessary that the defendant place his unlawful activity in such a position that interstate travelers may want to utilize it.

Indeed, almost all of the foregoing instances previously were considered to be "police court" or "magistrate court" offenses. In the short period of time since the enactment of 18 U.S.C. § 1952, this petty offense theory has gradually crept into the statute: in *United States v. Brennen*, 394 F.2d 151 (2nd Cir. 1968), passengers on an interstate excursion ferry back and forth from New Jersey to New York regularly carried on a large stakes gambling card game; in *South v. United States*, 368 F.2d 202 (5th Cir. 1966), a professional gambler waited around a bar to pick up card players (his conviction was reversed only because checks which were transmitted in interstate commerce in payment of the gambling debt were not traceable directly to the defendant); in *United States v. Chambers*, 382 F.2d 910 (6th Cir. 1967), the operator of a house of prostitution in Covington, Kentucky, because taxi drivers frequently transported his customers across the river from Cincinnati, Ohio; in *United States v. Carpenter*, 392 F.2d 205 (6th Cir. 1968), the defendant worked in a gambling house in Tennessee, but occasionally went to Georgia to visit his children in the custody of his separated wife where his travel back to Tennessee was held to violate the statute.

The implications of the Fifth Circuit opinion are even greater when the extent of the "attraction" by Rewis and Williams is considered. The Williams house, where the gambling occurred, was one of five or six homes in a small group of homes at a diminutive community known as Yulee, Florida, situated at the crossroads between Fernan-

dina, Florida, and Jacksonville, Florida, but also situated about a half mile from the highway which led to Georgia (Tr. 685, 686). The trial evidence reflected that numerous people engaged in betting at the Mary Williams home, the Georgia players were only a small portion of them. There was no evidence of any advertising or attempts by Williams or Rewis to induce out-of-state travelers to come to the Williams home. The only attraction was the geographical location, approximately fifteen miles from the State line and farther to the nearest Georgia town. When this factor is considered the "attraction" theory would subject to Federal prosecution any person who operated any of the specified unlawful activities in any border town, or in any other location where out-of-state travelers are known to be predominant. This interpretation of the statute raises obvious questions which would test its definiteness within constitutional limitations. What scienter is required of the perpetrator? Must he have actual knowledge that interstate travelers are participating in his unlawful activity? Is it sufficient that there is simply a probability that the unlawful activity will attract interstate travelers? What distance from a State border will justify the inference that a gambler (or other violator of the statute) could expect his unlawful activity to attract interstate travelers? In the case at bar, fifteen miles was considered sufficient. Surely this was not the intent of the Congress.

Incorporated in the Senate report (Report No. 644, 87th Cong. First Sess. dated July 27, 1961) the following appears:

> "The bill, S. 1653, was introduced by the Chairman of the Committee, Senator James O. Eastland, on April 18, 1961, on the recommendation of the Attorney General, Robert F. Kennedy, as a part of the Attorney General's legislative program to combat organized crime and racketeering.
>
> "The Attorney General testified before the committee in support of the bill, S.1653, on June 6, 1961, and commented:

'* * * *we are seeking to take effective action against the racketeer who conducts an unlawful business but lives far from the scene in comfort and safety, as well as against other hoodlums.*

'*Let me say from the outset that we do not seek or intend to impede the travel of anyone except persons engaged in illegal businesses as spelled out in the bill.* * * *

'*The target clearly is organized crime.* The travel that would be banned is travel "in furtherance of a business enterprise" which involves gambling, liquor, narcotics, and prostitution offenses or extortion or bribery. Obiouvly, we are not trying to curtail the sporadic, casual involvement in these offenses, but rather a continuous course of conduct sufficient for it to be termed a business enterprise.'

* * * * *

'Our investigations also have made it quite clear that only the Federal Government can shut off the funds which permit the top men of organized crime to live far from the scene and, therefore, remain immune from the local officials. So we believe that the Federal Government has a definite responsibility to move against these people and limit their use of interstate commerce.'" (Emphasis supplied)

Also contained in the same report is a letter from the Attorney General to the Vice-president of the United States, in which the following appears:

"The bill which I submit to the Congress would impose criminal sanctions upon the person whose *work* takes him across State or National boundaries in aid of certain 'unlawful activities.' These are defined in the bill as business enterprises involving gambling, liquor, narcotics, or prostitution activities which are offenses under Federal law or the law of the State where they are committed, and extortion and bribery. The bill would also have the effect, through its interaction with Section 2 of Title 18, United States Code, of prescribing penalties for persons who send others on similar missions. Such violations would be punishable by a fine as high as $10,000 or a prison term of up to five years or both.

> "The effect of this legislation would be to impede the clandestine flow of profits from criminal ventures and to bring about a serious disruption in the far flung organization and management of coordinated criminal enterprises. It would thus be of material assistance to the States in combatting pernicious undertakings which cross State lines." (Italics supplied)

When the legislation was being considered in the House of Representatives, Representative Harris in a colloquy with Representative Celler, to establish a legislative purpose in the Congressional Record, stated that the bill "has for its purpose dealings with certain syndicated crime" and that, "It is not to go beyond matters of syndicated crime." See, 1961 Congressional Record–House, Page 16541. During the same colloquy a letter from Senator John L. McClelland and Representative Oren Harris to the Attorney General was placed in the Congressional Record. In that letter the writers announced, "We understand from your testimony before the Senate and House Judiciary Committee that the primary purpose of this bill is to provide a Federal law 'to take effective action against the racketeer who conducts an unlawful business but lives far from the scene in comfort and safety, immune from the local officials.' * * *" The remainder of the letter and the Attorney General's reply is significant.[5]

[5] "The questions that have arisen concern those business enterprises all of whose owners are bona fide residents of the State in which the business is located and which business provides legitimate dining facilities, shows, dancing, and other entertainment, and also offers or permits in connection therewith gambling in violation of State laws. Specifically, if S.1653 is finally enacted, will it prohibit and make unlawful the activities of such business enterprises as follows:

"(a) Presenting entertainment and transporting in interstate commerce property of any kind to be used in such entertainment or contracting for or paying fees, purchase price, rental or other expenses, and liabilities incurred in arranging for or presenting such entertainment.

"(b) *Advertising across State lines the legitimate activities such as shows, dining, dancing, and other entertainment if such advertising*

The Congress was concerned about the extent to which the statute might be construed to apply. It is seen that

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does not specifically mention or refer to the gambling opportunities or activities.

"(c) Ordering, purchasing, leasing, renting, otherwise acquiring, delivery or accepting delivery of any food, beverages, supplies, materials, equipment, furniture, furnishings, and other property in interstate commerce, to be used in the operation of legitimate activities, such as shows, dining, dancing, and other entertainment, but not to be used directly in the operation of gambling activities.

"(d) Cashing checks, drafts, or money orders of customers or patrons of the business enterprise, depositing such checks, and/or making collection or causing collection to be made of such checks, drafts, or money orders, or making collection of accounts of customers or patrons of such business enterprise, by use of the mail or otherwise in interstate commerce.

"It is our understanding that it is not the intention of the sponsors of S.1653 to have it cover and apply to the foregoing. If it is so intended and does apply, we should like to be so advised.

"Sincerely yours,

JOHN L. McCLELLAN
OREN HARRIS" (Emphasis supplied)

"OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., August 21, 1961.

"Hon. OREN HARRIS,
House of Representatives,
Washington, D.C.

"DEAR CONGRESSMAN: This is in response to your letter of August 18, 1961, requesting my views as to the scope of S.1653 a bill 'to prohibit travel or transportation in commerce in aid of racketeering enterprises'.

* * * * *

"An example of the type of activity which we consider to be within the purview of the statute would be travel to promote a continuous course of conduct involving gambling. Thus a gambling house would be within the definition of unlawful activity in the bill and any travel on the part of any person with the intent to establish a gambling house and a further act subsequent to the travel to promote that activity would be a violation of the section. Travel, to promote a legitimate business which may thrive because a gambling house is in the area, would not, in my opinion, violate the section.

enticing gamblers across State lines by providing supper clubs and entertainment for their "attraction" was not intended to be a violation.

Neither Rewis nor Williams ever crossed a State line in connection with their operation of the small Florida lottery. Although the issue is only incidentally involved here there is no evidence of "organized crime" as that elusive term may be defined. There is no evidence that either Rewis or Williams was a "racketeer who conducts an unlawful business but lives far from the scene in comfort and safety, immune from the local officials." It is not necessary, however, to define "organized crime" in this case. The legislative history shows that there was no intention by the Congress to condemn those who attract others across a State line to participate in an unlawful activity."

In summary it was intended to prohibit the travel to promote the gambling house, directly, and not to prohibit the travel to promote a hotel or supper club or any other legitimate business.

"In view of the foregoing, it is my opinion that making arrangements for entertainment in business establishments such as supper clubs, hotels, or motels which businesses are legitimate in the community or the advertising of those legitimate businesses or the purchasing of food or beverages or the collection of checks by legitimate banking houses through the medium of interstate commerce would not come within the intended prohibitions of the section."

CONCLUSION

The opinion of the court below which announces that the "travel" necessary to bring a person within the proscriptions of 18 U.S.C. § 1952 is proved by the placing of an unlawful activity in a geographical location so that out-of-state customers might be attracted to it, should be rejected and the judgment reversed.

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